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Office of the General Counsel

B-279750

April 24, 1998

The Honorable William V. Roth  
Chairman  
The Honorable Daniel Patrick Moynihan  
Ranking Minority Member  
Committee on Finance  
United States Senate

The Honorable Thomas J. Bliley, Jr.  
Chairman  
The Honorable John D. Dingell  
Ranking Minority Member  
Committee on Commerce  
House of Representatives

The Honorable Bill Archer  
Chairman  
The Honorable Charles B. Rangel  
Ranking Minority Member  
Committee on Ways and Means  
House of Representatives

Subject: Department of Health and Human Services, Health Care Financing  
Administration: Medicare Program; Schedule of Per-Beneficiary  
Limitations on Home Health Agency Costs for Cost Reporting Periods

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Health and Human Services, Health Care Financing Administration (HCFA), entitled "Medicare Program; Schedule of Per-Beneficiary Limitations on Home Health Agency Costs for Cost Reporting Periods" (RIN: 0938-AI84). We received the rule on April 9, 1998. It was published in the Federal Register as a final rule on March 31, 1998. 63 Fed. Reg. 15718.

The final rule, in accordance with section 4602 of the Balanced Budget Act of 1997, sets forth a new schedule of limitations on home health agency costs that may be

paid under the Medicare program for cost reporting periods beginning on or after October 1, 1997.

Enclosed is our assessment of HCFA's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that HCFA complied with the applicable requirements.

If you have any questions about this report, please contact James Vickers, Assistant General Counsel, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Department of Health and Human Services, Health Care Financing Administration, is William Scanlon, Director, Health Financing and Systems Issues. Mr. Scanlon can be reached at (202) 512-7114.

Robert P. Murphy  
General Counsel

Enclosure

cc: The Honorable Donna E. Shalala  
The Secretary of Health and  
Human Services

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE  
ISSUED BY  
THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,  
HEALTH CARE FINANCING ADMINISTRATION  
ENTITLED  
"MEDICARE PROGRAM; SCHEDULE OF PER-BENEFICIARY LIMITATIONS ON  
HOME HEALTH AGENCY COSTS FOR COST REPORTING PERIODS"  
(RIN: 0938-AI84)

(i) Cost-benefit analysis

HCFA has assessed the impact of the final rule and finds that it will decrease payments to home health agencies by approximately \$1.06 billion in fiscal year 1998 and \$2.14 billion in fiscal year 1999.

(ii) Agency actions relevant to the Regulatory Flexibility Act, 5 U.S.C. §§ 603-605, 607, and 609

In the preamble to the final rule, HCFA discusses, in the form of a combined Regulatory Impact Analysis and Regulatory Flexibility Analysis, the effect of the final rule on small entities. The small entities include most providers, physicians, and health care suppliers, either by virtue of their non-profit status or by having revenues of \$5 million or less annually.

HCFA states that it is clear that the rule will have a significant impact on a substantial number of small entities since the aggregate per-beneficiary limitation will reduce payments by approximately 9 percent.

While HCFA states that it has examined the options for lessening the burden on small entities, since the statute does not allow for any exceptions to the aggregate per-beneficiary limitation based on the size of the entity, no regulatory relief can be provided for small entities.

(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535

HCFA states that the final rule will not impose a federal intergovernmental or private sector mandate of \$100 million or more, as defined in the Unfunded Mandates Act of 1995.

(iv) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 et seq.

This rule was issued as a final rule with comment period because the Secretary of Health and Human Services found "good cause" that notice and comment were impracticable. 5 U.S.C. § 553(b)(B). The Balanced Budget Act of 1997, enacted August 5, 1997, required the per-beneficiary limitations be established by April 1, 1998. HCFA, among other calculations, had to perform a special data collection from its fiscal intermediaries to obtain cost report data and generate an unduplicated census count from the National Claims History Standard Analytical File.

For the same reason regarding the statutorily mandated effective date, the 30-day delay in the effective date of a rule required by 5 U.S.C. § 553(d) was also waived.

Since there was neither a proposed rule nor the receipt of public comments, HCFA has properly invoked the exception found at 5 U.S.C. § 808(2) to the 60-day delay in the effective date of a major rule normally required under the Congressional Review Act subtitle of the Small Business Regulatory Enforcement Fairness Act of 1996.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

HCFA notes in the preamble that the final rule does not have any collections of information that would be subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act.

Statutory authorization for the rule

The final rule was promulgated pursuant to the authority in section 1861(v)(1)(L) of the Social Security Act (42 U.S.C. § 1395x(v)(1)(L)) and section 4207 of Pub. L. 101-508 (42 U.S.C. § 1395x (note)).

Executive Order No. 12866

The final rule was determined to be an "economically significant" regulatory action by the Office of Management and Budget and was approved by OMB as complying with the requirements of the Order on March 26, 1998.